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No. 92-848

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JAMES R. CRUCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I.

IMPOSITION OF SENTENCE PURSUANT TO MORE PUNITIVE GUIDELINE AMENDMENTS ADOPTED AFTER THE DEFENDANT'S OFFENSES HAD BEEN COMMITTED VIOLATE THE EX POST FACTO CLAUSE.

II.

THE COURT ERRED IN ACCEPTING DEFENDANT'S CRUCE'S PLEA TO THE CONSPIRACY COUNT AND ERRED IN ITS REFUSAL TO PERMIT DEFENDANT CRUCE TO WITHDRAW HIS PLEA TO THAT COUNT AS A SUFFICIENT FACTUAL BASIS WAS NOT MADE TO SUPPORT THE PLEA AS CONSTRUED BY THE COURT IN VIOLATION OF RULE 11, F.R.Cr.P., AND THE DUE PROCESS CLAUSE.

III.

THE COURT ERRED IN FAILING TO SET ASIDE THE SENTENCE IMPOSED AND GRANT RECUSAL WHEN IT WAS DISCLOSED THAT THE SENTENCING COURT RECEIVED AND CONSIDERED PREJUDICIAL EX PARTE COMMUNICATIONS FROM THE F.D.I.C. AND R.T.C. PRIOR TO SENTENCE, AND THE REMAND FOR RESENTENCING ORDERED BY THE TENTH CIRCUIT COURT OF APPEALS SHOULD BE HEARD BY A DIFFERENT DISTRICT JUDGE.

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Petitioner submits the following reply brief concerning matters first raised in the Brief For The United States in Opposition.

STATEMENT

The remand by the Tenth Circuit for resentencing was extremely narrow. The Court of Appeals affirmed petitioner's conviction and the manner in which the sentencing guidelines were applied and computed but held that petitioner was . . . entitled to resentencing during the course of which he shall have the opportunity to " . . . comment upon [the letters in question] the probation officers determination and other matters relating to the appropriate sentence." Pet.App. 11.

Characterization of the ex-parte letters sent to the sentencing judge by the R.T.C. and F.D.I.C. prior to sentencing as " . . . discussing his case." Brief in Opposition, page 3, constitutes a substantial mischaracterization of the letters. See C.A.App. A322-338 for the full text of the letters. The letter written by Jack Smith Deputy General Counsel for the F.D.I.C. contained factual statements, arguments and conclusions relating to the offenses to which Cruce plead guilty, charges which were dismissed under the plea agreement and unindicted criminal acts. It contained numerous citations, statutory references, statements of legislative history, footnotes and was self-described on page 5 as a " . . . legal memorandum." It accused Cruce of assignation with prostitutes provided by a codefendant, Las Vegas money laundering, utilizing brown paper bags, unaccounted for millions in profits, lack of cooperation, refusal to comply with subpoenas and factual attributions to "sources." Both letters urged the court to impose a substantial prison sentence while the plea agreement entered into by the U.S. Attorney's Office and the petitioner provided " . . . that the Government will not advocate a specific sentence, fine or imprisonment." C.A.App. 60.

In footnote 1 of the Government's brief in opposition it is noted that codefendant Thomas Burger whose case was also remanded to the same district judge for resentencing by the

Tenth Circuit to permit him to comment upon similar ex-parte letters has been resentenced by that judge to the exactly the same sentence as was previously imposed prior to the appeal.

ARGUMENT

I.

IMPOSITION OF SENTENCE PURSUANT TO MORE PUNITIVE GUIDELINE AMENDMENTS ADOPTED AFTER THE DEFENDANT'S OFFENSES HAD BEEN COMMITTED VIOLATE THE EX POST FACTO CLAUSE.

The district court in making its finding that the petitioner's offense continued past the effective dates of the guideline amendments ignored the clear record made at the time of the plea of guilty. While the indictment alleged that the conspiracy continued to the return date [January 10, 1991] the only evidence that the district court had as a basis for its finding was the petitioner's plea of guilty which limited his participation in the conspiracy "during the time period from 1984 through 1987, . . . " C.A.App. A49.

During the in court plea proceeding the defendant was sworn and the district court examined the petitioner and stated referring to the Petition to Plead Guilty "this petition alleges that during the time period from 1984 through 1987, . . . " and the defendant acknowledge that he understood the court's statement and that he did those acts. C.A.App. A78-79. The court then requested that the prosecutor outline its evidence to prove the defendant guilty of the offense. The prosecutor made a detailed statement of facts concerning the offenses referring to activities in November 1987, December 1987, and July 1988. C.A.App. A80-84. The defendant acknowledged that he believed the Government had evidence against him that could prove him guilty of the four counts. C.A.App. A85. The substantive offenses alleged in the indictment were all alleged to have occurred between April 26, 1985, and November 21, 1988, and no date or action is referenced in the indictment subsequent to November 21, 1988. C.A.App. A1-47.

Thus, the defendant's plea and the factual statements of the prosecutor provided no evidence that petitioner's participation in the conspiracy alleged in the indictment continued past the effective dates of the amendments in 1989 and 1990 and the district court finding was totally inconsistent with petitioner's guilty plea and the factual statement of the prosecutor.

The statement in petitioner's Petition to Plead Guilty, his sworn answers to the court's questions and the prosecutor's factual statements related to both the substantive offenses and to the conspiracy charge and were limited to dates prior to the prejudicial amendments to the guidelines. It is axiomatic that a defendant may be guilty of conspiracy and plead guilty to conspiracy without admitting the totality of the acts alleged in the conspiracy count of the indictment. The district court thus had no evidence with which to make a finding that petitioner's conspiracy continued until 1991.

The substantive counts to which petitioner plead guilty were a part of the conspiracy and petitioner's statement clearly admitted to a conspiracy making specific reference to agreements with others to commit the offense. C.A.App. A49,78-79.

The finding of the district court quoted on page 7 of the Government's brief in opposition is not supported by the factual record made at the time of the plea or the Petition to Plead Guilty. The factual record on the plea only supports a finding of criminal activities which ended prior to the effective dates of the prejudicial amendments of the guidelines and thus imposition of sentence based upon the amendments to the guidelines clearly violates the ex post facto clause.

The decision of the Tenth Circuit in petitioner's case is in direct conflict with the Second Circuit decision in *United States v. Bloom*, 945 F.2d 14 (2nd Cir. 1991). As in *Bloom* petitioner here at his plea was explicit in stating the dates of his involvement in the conspiracy offense. This was made clear to the district court on two occasions, that is, the factual statement contained in the Petition to Plead Guilty and petitioner's sworn answers to the courts questions at the Rule 11

hearing. The Government's factual statement at the plea hearing also did not claim that defendant committed acts past the effective dates of the guideline amendments. The record in petitioner's case is fully as clear as that in *Bloom* where the defendant specified that his conduct occurred prior to the effective date of the guidelines. In *Bloom* the court held that the guidelines did not apply. Below, the Tenth Circuit, in conflict with *Bloom*, held that the prejudicial guideline amendments should be applied to petitioner. The court in *Bloom* also pointed out that the court in making its factual decisions concerning application of the guideline or application of guideline amendments must rely on the facts in the plea record and not on the dates stated in the indictment. The court specifically held that the ending date of indictment did not govern the decision. The court in *Bloom* stated:

> "Based on the foregoing, we conclude that a district court has the authority to determine whether a defendant's participation in the charged offense continued through the dates alleged in the indictment. Here, Bloom essentially negotiated a change in the plea agreement during the allocution by stating that he was only pleading guilty to conduct occurring prior to November 1, 1987. See Gov't Supp.App. at 5 ("[T]he U.S. Attorney's Office agreed not to charge David with committing any crimes after November 1, 1987."); see also *United States v. Edgecomb*, 910 F.2d 1309, 1312 (6th Cir. 1990) ("If [defendant] disagreed with the dates of the conspiracy, he should have attempted to negotiate a change in the plea agreement."). At the allocution, no specific evidence was presented which indicated that Bloom continued to commit the charged conduct beyond November 1, 1987. Since Bloom's plea allocution was deliberately limited to pre-Guidelines conduct and the government failed to introduce evidence of post-Guidelines conduct, the district court did not err in finding by a preponderance of the evidence that the defendant's illegal conduct occurred pre-Guidelines. Moreover,

> because Bloom specifically disclaimed that his conduct encompassed acts occurring after November 1, 1987, he may not now argue that he presented proof of such conduct to Judge Edelstein. See *United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990) (counsel who stated that his client's conduct extended past November 1, 1987 and agreed that his client should be sentenced under the Guidelines has waived his objection to the judge's proposed course of conduct.)."

Bloom apparently thought he would receive a shorter sentence if the guidelines were not applied. He specified the dates in his plea and the Government did not object and the court accepted the plea as stated. Here the same thing happened but the district court then ignored the limited nature of the plea which the Government had approved and it had previously accepted and imposed a sentence based upon the later effective and prejudicial guidelines. The decision below by the Tenth Circuit is clearly in conflict with *Bloom*.

The Tenth Circuit decision also conflicts with *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

The court in *Bakker* specifically held that the alleged ending date in the indictment does not govern the court's decision concerning applicability of guidelines or amendments. The Fourth Circuit correctly observed that relying upon the ending date alleged in the indictment would permit the Government to manipulate applications of the guidelines or guideline amendments.

The Tenth Circuit in its decision placed binding reliance upon the boiler plate allegation of the indictment "commencing at least as early as 1984, the exact date being unknown to the grand jury, and continuing until the return of this indictment, . . . " C.A.App. A5. The *Bakker* court required that the district court make its factual decision based upon the record and not the formal indictment allegations. As noted the only record compiled at the plea hearing were the admissions of the defendant and statement of fact by the Government which clearly showed only violations predating the effective date of the prejudicial amendments. Thus, the Tenth Circuit decision

below clearly conflicts with the Fourth Circuit's decision in *Bakker.* The decision also conflicts with this court's decision in *Miller v. Florida,* 107 S.Ct. 2446 (1987), 482 U.S. 423, 96 L.Ed.2d 351.

II.

THE COURT ERRED IN ACCEPTING DEFENDANT CRUCE'S PLEA TO THE CONSPIRACY COUNT AND ERRED IN ITS REFUSAL TO PERMIT DEFENDANT CRUCE TO WITHDRAW HIS PLEA TO THAT COUNT AS A SUFFICIENT FACTUAL BASIS WAS NOT MADE TO SUPPORT THE PLEA AS CONSTRUED BY THE COURT IN VIOLATION OF RULE 11, F.R.Cr.P, AND DUE PROCESS CLAUSE.

The Government's argument that the record shows that the conspiracy continued into 1991 is in error. The only record made at the time of the plea by the defendant in his answers to the district court's questions and by Government counsel in his factual statement of evidence that could be adduced only show that the conspiracy continued into November of 1988. Only the boiler plate allegation of the indictment alleging that the conspiracy "continuing until the return of this indictment, . . . " C.A.App. A5 suggests otherwise. The indictment of course is no proof or evidence of the matters alleged. Thus the only record made at the plea was that the defendant's involvement and the conspiracy ended in November of 1988.

If the district court construed the plea and found that the defendant's involvement in the conspiracy ended in November of 1988 then the record supported the plea and factual basis established pursuant to Rule 11.

If the district court was to construe the plea as being to a conspiracy continuing into 1991, then the factual basis was insufficient to support such a finding and the district court erred in accepting the plea. The requirements of Rule 11 for a factual basis do not permit the court to accept a plea such as petitioners which was very specific concerning his dates of involvement and thereafter construe the plea to extend the

defendant's involvement past the date which he admitted to and thereafter apply subsequently amended guidelines which quadrupled his sentence. The factual basis established at the plea therefore does not support the sentence imposed and reliance on guidelines amended after the dates specified by the defendant and accepted by the court.

If the court intended to construe defendant's plea as an admission to a conspiracy continuing into 1991 when in fact the plea entered by the petitioner only admitted to a conspiracy extending through 1987, then the district court was required to permit him to withdraw it and was not entitled to construe the plea as admitting to a conspiracy which extended beyond the date that the petitioner admitted.

The Government in footnote 3 on page 8 of its brief suggests that the petitioner did not disclaim an ongoing conspiracy. The petitioner twice during the plea proceeding specifically stated that he was involved from 1984 through 1987 and thereby denied that his offense continued past the effective dates of the guidelines amendments.

It should be noted that petitioner's motion to withdraw his plea was filed prior to imposition of sentence. Petitioner's counsel acted promptly prior to imposition of sentence when it was first determined that the probation office through the draft presentence report was contending that the prejudicial guideline amendments applied.

The decisions in *United States v. O'Hara*, 960 F.2d 11 (2nd Cir.1992) and *United States v. Rhodes*, 913 F.2d 839 (10th Cir.1990), cert denied, 111 S.Ct. 1079, have no application at bar. In *O'Hara*, the defendant had a "change of heart" and wanted a jury to decide his guilt. Here the defendant learned that the district court intended to construe his plea in a manner which was inconsistent with the factual record made at the plea hearing. Petitioner promptly made his motion to withdraw the plea at the first opportunity when he learned by way of the draft presentence report that the court intended to impose a sentence based on the amended guidelines. In *Rhodes*, the defendant had failed to disclose previous convictions to his counsel when counsel attempted to calculate a probable sentence under the guidelines. The undisclosed prior

convictions thus increased Rhodes criminal history category thereby increasing his guideline range. Petitioner made his position clear at the plea hearing specifying his dates of his involvement in the conspiracy offense. Finally, in *United States v. Lambey*, 974 F.2d 1389 (4th Cir. 1992), the defendant claimed to have relied upon an incorrect guideline estimate by his counsel. This decision has no application at bar.

Since the district court intended to construe petitioner's plea as an admission that his conspiracy offense continued into 1991 when his admissions only extended through 1987, the district court was bound to permit him the opportunity to withdraw the plea and thus not trap him by accepting a plea based on one set of facts and applying a different set of facts to calculate the sentence under the guidelines.

The petitioner thus plead guilty knowing the guidelines would apply but specifying that his conduct only continued through 1987. The district court then trapped him and imposed a sentence under subsequently amended guidelines which quadrupled his term. The provisions of Rule 11 and 32 must be enforced and the decision below reversed.

III.

THE COURT ERRED IN FAILING TO SET ASIDE THE SENTENCE IMPOSED AND GRANT RECUSAL WHEN IT WAS DISCLOSED THAT THE SENTENCING COURT RECEIVED AND CONSIDERED PREJUDICIAL EX PARTE COMMUNICATIONS FROM THE F.D.I.C. AND R.T.C. PRIOR TO SENTENCE, AND THE REMAND FOR RESENTENCING ORDERED BY THE TENTH CIRCUIT COURT OF APPEALS SHOULD BE HEARD BY A DIFFERENT DISTRICT JUDGE.

A characterization of the prejudicial ex parte letters from the R.T.C. and F.D.I.C. to the district court as statements of the " . . . victims of petitioner's crimes." fractures credulity. The F.D.I.C. and R.T.C. are only victims by reason of their appointment as receiver for the failed institutions. They are obviously highly experienced financial regulatory agencies

with sophisticated legal staff both in house and outside counsel. A review of the R.T.C. letter will show that it is an aggressive meticulously prepared sentencing memorandum authored by four lawyers and signed by the Deputy General Counsel of the F.D.I.C. C.A.App. A322-336. The 1-page letter signed by former F.D.I.C. Chairman L. William Siedman references the 15-page R.T.C. letter and invokes the imperator of his office as Chairman of the F.D.I.C. to influence the district court and urge imposition of a substantial term of imprisonment.

The Government in its brief argues that it would make no difference that the R.T.C. and F.D.I.C. mailed their letters to the court rather than to the U.S. Attorney. The U.S. Attorney's Office however could not send such letters to the court or the probation office as it agreed in the plea agreement " . . . that the Government will not advocate a specific sentence, fine or imprisonment." C.A.App. A60, thus the U.S. Attorney's Office could not send the letters. Even so the U.S. Attorney's Office would not write the court without copying the defendant's counsel.

While the defendant was aware that the Government would consult with appropriate federal regulatory agencies regarding his offense he had the right to expect that the information received and provided to the district court would be made known to him prior to sentencing in order to permit appropriate objections and showing pursuant to Rule 32(c)(3)(d).

This court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), supports the requirement of recusal of the district judge. This court held that scienter or knowledge was not an element of a recusal pursuant to § 455(a) Title 28 United States Code. The district court is required to recuse itself if its impartiality can be reasonably questioned and it must avoid the appearance of partiality. Here the district court's receipt and consideration of the letters coupled with its failure to advise the petitioner and his counsel illustrates partiality and requires recusal. The press release by the F.D.I.C. to R.T.C. confirm the appearance of impropriety.

The Government in its brief cites the statement of the district court that it did not consider the letters in imposing sentence. That statement is belied by the fact that the Tenth Circuit Court of Appeals remanded the matter to the district court for resentencing to permit the defendant to commit upon the letters. The statement of the district court is also belied by the fact that the district court imposed the exact amount of restitution suggested by the ex parte letter and used the same statutory language in imposing the restitution order, see C.A.App. A115, 334. See Petition for Writ of Certiorari No. 92-7196, pages 6-11 of codefendant Burger for a full discussion of the striking similarities between the proposals of the ex parte letters and the sentence imposed.

The freedom of the judiciary from improper communication by government agencies is at stake.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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